IN THE
MISSOURI SUPREME COURT

KENNETH BAUMRUK,	)	
	)	
Appellant,	)	
	)	
vs.	)	**No. SC 91564**
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF
ST. CHARLES COUNTY, MISSOURI
ELEVENTH JUDICIAL CIRCUIT, DIVISION 3
THE HONORABLE LUCY D. RAUCH, JUDGE

APPELLANT'S REPLY BRIEF

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JURISDICTION AND STATEMENT OF FACTS

The Jurisdictional Statement and Statement of Facts from the Appellant's Original Brief are incorporated here.

POINTS RELIED ON

I.

DR. KANE TESTIMONY

The motion court clearly erred overruling Baumruk's 29.15 because effective counsel would have objected to all Kane matters because the physician-patient privilege applied. That privilege is waived only if done voluntarily and Kane's information was "extorted" as respondent breeched the privilege when respondent deposed Kane to preserve Kane's testimony for the first trial. Like personal injury plaintiffs, the privilege is waived only as to matters placed in issue and Kane's ER treatment had nothing to do with Baumruk's defense. Counsels' experts provided no testimony linking Baumruk's Kane statements and Baumruk's defense and counsel made no argument linking them, and therefore, it was not counsel's reasonable strategy to allow the Kane matters. Counsel disclosed the Kane matters because they erroneously believed the privilege did not apply and not because of reasonable strategy. Failing to object to Kane was unreasonable because at Baumruk's first trial Kane only testifed in penalty and respondent argued there, as here, Kane provided aggravation. Kane's testimony was not cumulative because Kane condemned Baumruk's "vehemence and coldness" and respondent argued Kane's commentary for death. Respondent's evidence was not overwhelming because the Atlanta courthouse shooter's jury did not vote for death where he killed four people,

including his judge and two court personnel, while, like Baumruk, relying on mental disease.

State ex rel. Health Midwest Development Group Inc. v. Daugherty,965S.W.2d841(Mo.banc1998);

State ex rel. Chance v. Sweeney,70S.W.3d664(Mo.App.,S.D.2002);

Metropolitan Life Ins. Co. v. Ryan,172S.W.2d269(Mo.App.St.L.D.1943);

State ex rel. Stecher v. Dowd,912S.W.2d462(Mo.banc1995);

U.S. Const. Amends. VI, VIII, XIV;

§491.060;

Multiple Life Terms For Courthouse Killings In Atlanta, N.Y. Times, December 13, 2008 Associated Press http://www.nytimes.com/2008/12/14/us/14atlanta.html?_r=1.

II.

HEARING REQUIRED EMT WORCHESTER – BAUMRUK'S APOLOGY

The motion court clearly erred denying without an evidentiary hearing the claim counsel was ineffective for failing to call EMT Worchester because an amended motion is required to plead only facts that warrant relief and is not required to anticipate legal theories a motion court may rely on to reject a claim. It was especially critical for the jury to have heard Baumruk expressed remorse because counsel failed to present other evidence that would have countered statements Baumruk made suggesting a lack of remorse.

State v. Driver,912S.W.2d52(Mo.banc1995);

U.S. Const. Amends. VI, VIII, XIV.

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RESPONDENT'S REPEATING SLIDE SHOW – APPELLATE COUNSEL INEFFECTIVE

The motion court clearly erred overruling Baumruk's 29.15 claim appellate counsel was ineffective for failing to raise counsel's objections to a repeating highly emotionally charged slide show during penalty rebuttal argument because reasonable appellate counsel would have obtained a stipulation so as to place before this Court the slide show so that this Court could have reviewed the slide show for error and prejudice. Thus, appellate counsel's decision not to raise this claim was not reasonable strategy.

Lassen v. State,717S.W.2d538(Mo.App.,S.D.1986);

State v. Johnson,486S.W.2d491(Mo.1972);

Gardner v. Florida,430U.S.349(1977);

U.S. Const. Amends. VI, VIII, XIV.

XVII.

RABUN'S DIVORCE

The motion court clearly erred overruling Baumruk's 29.15 because counsel was ineffective for failing to cross-examine and impeach Rabun that he rendered his first opinions about Baumruk's mental state while Rabun's divorce was pending in front of Judge Hais, an alleged target of Baumruk's courtroom shooting, because the amended motion alleged counsel was ineffective for failing to "introduce evidence" to show Rabun's bias because the noted facts established Rabun had "a conflict of interest" and the claim presented in the Point Relied On and briefed is the same as contained in the 29.15 pleadings. Moreover, the reason counsel failed to "introduce evidence" was because counsel failed to investigate.

Black v. State,151S.W.3d49(Mo.banc2004);

Wainwright v. State,143S.W.3d681,689(Mo.App.,W.D.2004);

U.S. Const. Amends. VI, VIII, XIV.

ARGUMENT

I.

DR. KANE TESTIMONY

The motion court clearly erred overruling Baumruk's 29.15 because effective counsel would have objected to all Kane matters because the physician-patient privilege applied. That privilege is waived only if done voluntarily and Kane's information was "extorted" as respondent breeched the privilege when respondent deposed Kane to preserve Kane's testimony for the first trial. Like personal injury plaintiffs, the privilege is waived only as to matters placed in issue and Kane's ER treatment had nothing to do with Baumruk's defense. Counsels' experts provided no testimony linking Baumruk's Kane statements and Baumruk's defense and counsel made no argument linking them, and therefore, it was not counsel's reasonable strategy to allow the Kane matters. Counsel disclosed the Kane matters because they erroneously believed the privilege did not apply and not because of reasonable strategy. Failing to object to Kane was unreasonable because at Baumruk's first trial Kane only testifed in penalty and respondent argued there, as here, Kane provided aggravation. Kane's testimony was not cumulative because Kane condemned Baumruk's "vehemence and coldness" and respondent argued Kane's commentary for death. Respondent's evidence was not overwhelming because the Atlanta courthouse shooter's jury did not vote for death where he killed four people,

including his judge and two court personnel, while, like Baumruk, relying on mental disease.

Respondent has argued multiple grounds for why Baumruk's statements to Kane were not prohibited from use under the physician-patient privilege of §491.060.5 because the privilege was either inapplicable or waived. None of these arguments have merit.

Respondent argues that the statutory privilege of §491.060.5 protects "only **statements** that are necessary to provide treatment" (bold in respondent's brief) and relies on *State v. Henderson*,824S.W.2d445(Mo.App.,E.D.1991)(Resp.Br.26). Initially, it should be noted that in rejecting the claim of physician-patient privilege, *Henderson* did not make any distinction based on whether a statement was necessary to providing treatment. In *Henderson*, the defendant called a nursing center and conveyed to nurses his intentions to kill his wife. *Id.*447. On appeal, Henderson argued it was error for the court to have compelled him to disclose his conversations with nurse counselors at the nursing center because of the physician-patient privilege of §491.060. *Id.*449. The *Henderson* Court noted that communications made to nurses who are "acting under the direction of a physician or assisting him in his treatment" are privileged. *Id.*450. Henderson's physician-patient privilege claim was rejected because the nurses were not acting under the direction of a physician and because Henderson "never established a physician-patient relationship because he never sought treatment." *Id.*450. Henderson provides no support that the §491.060 physician-patient privilege is limited to "statements that are necessary to provide

treatment" because there never was a physician-patient relationship established there, whereas with Baumruk he sought treatment and a physician-patient relationship existed.

Section 491.060.5 (emphasis added) provides that a physician is incompetent to testify:

> concerning any **information** which he or she may have **acquired** from any patient while attending the patient in a professional character, and which **information** was **necessary** to enable him or her to **prescribe and provide treatment** for such patient as a physician. . . .

The express language of the statute is that **information** acquired and necessary to prescribe and provide treatment is the yardstick for measuring whether the physician-patient privilege applies. Under the unambiguous language of §491.060.5, the physician-patient privilege is not limited to statements necessary to prescribe and provide treatment as respondent now asserts. This view that the §491.060.5 physician-patient privilege applies to "information" is supported by this Court's observation that §491.060.5 "prohibits the disclosure of confidential medical **information** by means of formal discovery such as interrogatories, depositions, or production of medical records." *See State ex rel. Health Midwest Development Group Inc. v. Daugherty*,965S.W.2d841,844(Mo.banc1998)(emphasis added). This Court did not say statements in *Health Midwest*, it said **information**.

This Court has recognized that '"If the intent of the legislature is clear and unambiguous, by giving the language used in the statute its plain and ordinary

meaning, then we are bound by that intent and cannot resort to any statutory construction in interpreting the statute."' *Howard v. City of Kansas City*,332S.W.3d772,787(Mo.banc2011)(quoting *Scott v. Blue Springs Ford Sales, Inc.*,215S.W.3d145,161(Mo.App.,W.D.2006)). What respondent is urging this Court to do is interpret the use of "information" in §491.060.5 to mean "statements," which under *Howard* this Court has indicated it cannot do. The legislature has used both "information" and "statements" when addressing privileges in other contexts, and therefore, had very definite intentions when it preferred one over the other.

For example, under Probate Code Guardianship §475.075.6 (emphasis added) the legislature has directed as follows:

> If prima facie proof of partial or complete incapacity or disability is made**, a physician** or licensed psychologist **is competent** and may be compelled to testify as to **information** acquired from the respondent, **despite otherwise applicable testimonial privileges**. Evidence received under this subsection which would otherwise be privileged may not be used in any other civil action or criminal proceeding without the consent of the holder of the privilege.

Noteworthy here is that while using "information" §475.075.6 takes just the opposite position of §491.060.5 in that §475.075.6 provides a physician is competent to testify, despite otherwise available testimonial privileges. The legislature recognized that adhering to protecting the physician-patient privilege it chose to protect "information" under §491.060.5 because '"[t]he purpose of the physician-patient privilege is to enable the patient to secure complete and appropriate medical treatment by

encouraging candid communication between patient and physician, free from fear of the possible embarrassment and invasion of privacy engendered by an unauthorized disclosure of information."' *State ex rel. Dean v. Cunningham*,182S.W.3d561,567(Mo.banc2006)(quoting *State ex rel. Woytus v. Ryan*,776S.W.2d389,392(Mo.banc1989)). In a like manner, in requiring disclosure of "information" normally confidential under the physician-patient privilege as provided for in §475.075.6, the legislature chose to use "information" because doing so affords the greatest reliability in the decision making process as to whether a person is incapacitated or disabled and in need of a guardian. When the legislature has chosen to use the word "information," instead of "statements," it has done so for very definite reasons.

In a similar vein, Section 375.022 governs appointment or termination of agents for insurance practice. Section 375.022.12 (emphasis added) governs privilege availability as to "information" and provides:

> **No waiver of any applicable privilege** or claim of confidentiality in the documents, materials, or **information** shall occur as a result of disclosure to the director pursuant to this section or as a result of sharing as authorized in subsection 7 of this section.

When the legislature intended to address privilege matters involving "statements" it has used the word "statements." Chapter 409 governs the regulation of securities. Section 409.6-607 declares generally that records filed under the securities act are public documents. That provision then recognizes certain exceptions

to what are public records. In particular, §409.6-607(b)(2) (emphasis added) provides:

> (b) The following records are not public records and are not available for public examination under subsection (a):
>
> (2) A part of a record filed in connection with a registration statement under sections 409.3-301 and 409.3-303 to 409.3-305 or a record under section 409.4-411(d) that contains trade secrets or confidential information if the person filing the registration **statement** or report has asserted a claim of confidentiality or **privilege that is authorized by law**;

Section 374.210 governs Department of Insurance practices. Section 374.210.4 (emphasis added) provides:

> A person is not excused from attending, testifying, filing a statement, producing a record or other evidence, or obeying a subpoena of the director under an action or proceeding instituted by the director on the grounds that the required testimony, statement, record, or other evidence, directly or indirectly, may tend to incriminate the individual or subject the individual to a criminal fine, penalty, or forfeiture. If the person refuses to testify, file a **statement**, or produce a record or other evidence on the basis of the individual's **privilege against self-incrimination**, the director may apply to the circuit court of any county of the state or any city not within a county to compel the testimony, the filing of the statement, the production of the record, or the giving of other evidence. The testimony, record, or other evidence compelled under such an

> order may not be used as evidence against the person in a criminal case, except in a prosecution for perjury or contempt or otherwise failing to comply with the order.

What these multiple statutes demonstrate is that when the legislature used the word "information" in the context of privilege the legislature did not equate it with "statements." Likewise, when the legislature used "statements" in the context of privilege the legislature did not equate it with "information." This Court should reject respondent's assertion that "information" as used in §491.060.5 should be construed to mean "statements" based on the clear unambiguous plain and ordinary meaning of "information." *See Howard* and *Scott, supra.*

Baumruk's Kane statements were information acquired and necessary to prescribe and provide him treatment. *See* §491.060.5. As discussed in Baumruk's original brief, Kane testified that his inquiries were made to assess Baumruk's airway and awareness because the fact Baumruk **was able to converse at all** established he had an airway and guided Kane in determining which medical specialists were needed to treat Baumruk. *See* Original Brief at 49-50. Kane's express testimony in this regard refutes respondent's blanket assertion "nothing in the record indicates that his medical treatment depended on the information that Appellant had 'shot that bitch'"(Resp.Br.27). Likewise, it is irrelevant that Baumruk's response to Kane was non-responsive to the question posed (Resp.Br.27) because the critical matter to Kane was whether Baumruk responded at all. *See* Original Brief at 49-50.

Respondent paints with an across-the-board brush that because Baumruk relied on a mental disease defense he entirely waived the physician-patient privilege(Resp.Br.28-29). Respondent asserts the privilege was waived because Baumruk's statements to Kane were disclosed to both defense and state experts(Resp.Br.28)(relying on 2ndTrialTr.1832,2111,2197-99,2426). In the retrial defense guilt case, after respondent's witness Kane recited what Baumruk said and Kane commented on the "vehemence" of Baumruk's words (2ndTrialTr.1657-58,1664-65), Dr. Nettles (2ndTrialTr.1779-1903) and Dr. Shopper testified(2ndTrialTr.1993-2113). Nettles testified generally that documents relating to Kane's involvement were among the 4,630 pages of documents Nettles reviewed(2ndTrialTr.1790-99,1832). Shopper testified documents relating to Kane's involvement merely were among the 5,630 pages that he reviewed(2ndTrial Tr.1950-52,2111). The reason counsel disclosed the Kane material at all was because counsel erroneously believed Kane's testimony was admissible because they viewed Baumruk's statements as unnecessary for treatment and erroneously believed any privilege was waived by relying on a mental disease defense(29.15Tr.360-61,425-27,506,510-14,551). Counsels' making available the Kane material to anyone, including Nettles and Shopper, was premised on a mistaken view that Baumruk was not entitled to maintain his physician-patient privilege as to the treatment Kane provided and was not a matter of reasonable strategy. *See State v. McCarter*,883S.W.2d75,78(Mo.App.,S.D.1994). As discussed here, Baumruk's

communication with Kane was necessary for treatment and there was not a total privilege waiver because he relied on mental disease or defect.

This Court's February 24, 1998, opinion ordered Baumruk's original charges dismissed and respondent then immediately refiled its charges against Baumruk. *See State ex rel. Baumruk v. Belt*,964S.W.2d443(Mo.banc1998) and Original Appellant's brief at 3-4,87-93.

A party does not waive a confidential privilege unless the waiver is voluntary. *Smith v. Smith*,839S.W.2d382,385(Mo.App.,S.D.1992). In particular, to waive the confidential physician-patient statutory privilege such disclosure must be voluntary. *State ex rel. Chance v. Sweeney*,70S.W.3d664,670(Mo.App.,S.D.2002); *State ex rel. Williams v. Vardeman*,422S.W.2d400,408(Mo.App.,K.C.1967). "Information obtained by reason of an adverse party's inquiry is considered to be "extorted" and involuntary." *Chance*,70S.W.3d at 670.

Respondent took Dr. Kane's deposition on June 17, 1998 after respondent refiled Baumruk's charges in response to this Court's opinion(29.15Ex.18). *See Belt, supra*. Respondent deposed Kane because he was preparing to leave the U.S. to do fellowship training in Taiwan(29.15Ex.18 at 5-6). At Kane's deposition, respondent had Kane's treatment notes marked as Deposition Exhibit 1(29.15Ex.18 at 11). Respondent elicited from Kane, based on the treatment records Kane generated for Baumruk, that Baumruk had said he "wanted to shoot that bitch" because of "divorce"(29.15Ex.18 at 13,15). In preparing to take Kane's deposition, the prosecutor who did the deposition, Lasater, had contacted Kane and informed Kane

that he wanted to elicit from Kane Baumruk's quoted statement about wanting to "shoot the bitch because of the divorce"(29.15Ex.18 at 17-18).

The state breeched Baumruk's physician-patient privilege when it deposed Dr. Kane on June 17, 1998, to preserve Kane's testimony in anticipation of Kane's being out of the country for the first trial(29.15Ex.18). The disclosure of Baumruk's statements was not voluntary, and therefore, the privilege was never waived. *See Smith*, *Chance*, and *Williams*. Baumruk's statements were in fact "extorted" during respondent's 1998 Kane deposition. *See Chance*.

In *Metropolitan Life Ins. Co. v. Ryan*,172S.W.2d269,272(Mo.App.St.L.D.1943), the Court held that the failure at one trial to object to the introduction of testimony on the ground of privilege does not waive the right to make such objection on a subsequent trial of the same case. Applying that principle, the *Ryan* Court concluded that the physician-patient privilege was not waived in an action to cancel an insurance policy based on fraud when the privilege was not asserted in a separate action finding the policy holder mentally incompetent. *Id.*272-73.

Baumruk's first trial counsel, Joseph Green, took no action to object and assert the physician-patient privilege at Kane's deposition when the state elicited Baumruk's communication with Kane and Kane's contempt and disdain for Baumruk's words. Green's failure to object was simply continued by retrial counsel, Kenyon and Steele. Kenyon and Steele had a duty to assert and preserve Baumruk's physician-patient privilege, even though counsel from the first trial failed to take that action. *See*

Metropolitan Life Ins. Co. Kenyon and Steele had a duty to assert Baummruk's privilege because it was the state which affirmatively acted to violate Baumruk's privilege at Kane's deposition when it "extorted" the statements it did from Kane. *See Smith*, *Chance*, and *Williams*.

This Court has recognized that '"when a party once places the question of his mental condition in issue he thereby waives the ***physician-patient*** privilege to exclude testimony of any doctors who have examined him for that purpose."' *State v. Johnson*,968S.W.2d123,131(Mo.banc1998)(bold and italics in original)(quoting *State v. Carter*,641S.W.2d54,57(Mo.banc1982)). The rationale for that rule is "[a] defendant cannot call those doctors who support his position and then try to prevent the testimony of other doctors who examined him for the same condition." *Johnson*,968S.W.2d at 131(citing *Carter*,641S.W.2d at 57). According to respondent, limiting the waiver of the physician-patient privilege to those doctors who have examined a defendant for the purpose of his mental condition is at odds with narrowly construing statutory privileges(Resp.Br.29). What this Court recognized in *Johnson* was that it is inequitable and obstructs the truth finding function for a party to rely on a doctor's testimony that is favorable to his mental condition defense and at the same time then be allowed to assert the physician-patient privilege as to other doctors whose opinions are unfavorable as to a mental disease defense. Neither Nettles (2ndTrialTr.1779-1903) nor Shopper (2ndTrialTr.1993-2113) relied on Kane's emergency room treatment, and in particular, Baumruk's "shoot the bitch because of divorce" statements, to support that Baumruk suffered from a persecutory delusional

disorder. Here Kane had nothing to do with Baumruk's mental disease defense and reasonable counsel would have objected to all uses of Kane's testimony because the privilege was not waived. *See Johnson* and *Carter*.

In a like manner in the civil personal injury arena, this Court has held that "once plaintiffs put the matter of their physical condition in issue under the pleadings, they waive the physician-patient privilege insofar as information from doctors or medical and hospital records **bears on that issue.**" *State ex rel. Stecher v. Dowd*,912S.W.2d462,464(Mo.banc1995)(emphasis added). In such circumstances, the physician-patient privilege is waived only as to "the physical conditions at issue under the pleadings." *Id.*464. This Court granted a writ of prohibition in *Stecher* because the medical records release form the defendants prepared was "overly broad and unlimited in scope." *Id.*465. Thus, *Stecher* recognized that to the extent there is any physician-patient waiver it is limited to those conditions that are placed in issue. For this Court to adopt respondent's argument would create an arbitrary distinction lacking any sound principle between personal injury and criminal cases.

Respondent points to 29.15 testimony from Baumruk's counsel that Kane's trial testimony was consistent with Baumruk's delusional disorder defense(Resp.Br.29). While counsel gave that testimony, they never presented any testimony from Nettles or Shopper linking Baumruk's statements to Kane with the delusional disorder defense(2ndTrialTr.1779-1903,1993-2113). Moreover, counsel neither argued in guilt (2ndTrialTr.2676-2711) nor penalty (2ndTrialTr.3044-69) that Baumruk's statements to Kane supported a delusional disorder or a life sentence.

Counsels' strategy must be objectively reasonable and sound. *State v. McCarter*,883S.W.2d75,78(Mo.App.,S.D.1994). Any strategy that included failing to assert Baumruk's physician-patient privilege was unreasonable.

At Baumruk's first trial, respondent called Kane as a penalty phase aggravation witness to testify Baumruk made his "shoot the bitch because of divorce" statement(1stTrialTr.Vol#9.5 at 51-52).[1] Kane testified that he put Baumruk's statement in quotation marks because it was a "verbatim" statement of Baumruk(1stTrialTr.Vol#9.5 at 66). After respondent established the reason the statement was quoted, respondent's questioning continued:

> Q: Now, did you ever come across something like that in your years in the emergency room?
>
> A: No. The reason why I included it, I have vivid memory of that, is because I was struck by **the vehemence of the words**. And throughout the interview he was -- the patient was quite determined to bring that across in our discussion, or in our interview - -
>
> Mr. Green: Judge - -
>
> A: -- and it was striking.
>
> Mr. GREEN: Judge, at this time I have to object to the statement that the patient was quite determined. Lack of foundation. It's not in the record of the

[1] Transcript Volume #9.5 begins with page 1.

notes. He's now reading the mind of what the patient was thinking at the time. And I would ask that it be stricken from the record.

THE COURT: Overruled.

Q: (By Mr. Lasater) Without the chart **is this something you would have ever forgotten?**

A: **No. I would never have forgotten that.**

Mr. LASATER: No further questions.

(1stTrialTr.Vol#9.5 at 67)(emphasis added).

Respondent's initial penalty closing argument in the first trial included:

> In addition to those people who were shot at and the people who were shot, remember somebody like Dr. Kane. Dr. Kane will never forget this man. He told him exactly why he killed his wife and he told him with such coldness and **with such vengeance that it shook him**. Remember his testimony on Saturday.

(1stTrialTr.2240)(emphasis added).

Reasonable counsel who knew how respondent had used Kane as a witness in aggravation and argued Kane's testimony to the jury at the first trial would have asserted Baumruk's physician-patient privilege, which he was entitled to maintain as to Kane. *See McCarter*, *Smith*, *Chance*, and *Williams*. Moreover, reasonable counsel who had read Kane's deposition and saw Prosecutor Lasater had contacted Kane for the express purpose of eliciting the statements at issue here (29.15Ex.18 at 17-18) would have asserted Baumruk's physician-patient privilege.

Acording to respondent, Baumruk was not prejudiced because the Kane matters were cumulative to other witnesses who testified that Baumruk had used other offensive language in referring to Mary(Resp.Br.30). During Kane's testimony he described how he is a plastic surgeon who treats children with congenital face, lip, and pallet defects, as well as, treating children who have suffered traumatic injuries(2ndTrialTr.1653-54). Respondent's special emphasis on Kane's rendition, who respondent only called in the first trial in aggravation, *see supra*, was different and prejudicial. Kane's testimony was prejudicial as to guilt and penalty because respondent elicited from Kane that he **"vividly"** remembered the words he placed in quotes and could remember them without Baumruk's medical records due to their impact on him because "despite being under the obvious stresses of multiple wounds this man was expressing **great vehemence and coldness** about having reached a conclusion to something."(2ndTrialTr.1664-65)(emphasis added).[2] Unlike as to other witnesses, the jury heard the prosecutor argue in initial penalty for death because the jury could "see how this affected him [Kane], a surgeon who fixes children. And almost 15 years later, he told you he would never ever forget how cold, how calm, how cruel Ken Baumruk was."(2ndTrialTr.3041). The jury heard Kane, unlike other

[2] Baumruk's original brief sets out in detail how respondent used Baumruk's statements to Kane with the experts on both sides as evidence for rejecting Baumruk's guilt phase mental disease or defect defense and those arguments as to guilt phase prejudice are incorporated here, but not repeated. *See* Original Brief at 51-52.

witnesses, express the impact on him of Baumruk's words and Kane's commentary expressing his condemnation of Baumruk. Kane's special dignified stature as someone who "fixes children" only added to the prejudice of Kane's commentary on his disdain for Baumruk and Baumruk's words.

Respondent also argues that respondent's evidence against Baumruk was so overwhelming that there is not a reasonable probability of a different result(Resp.Br.30). In 2005, Brian Nichols was charged in Atlanta with rape. *See Multiple Life Terms For Courthouse Killings In Atlanta*, N.Y. Times, December 13, 2008 Associated Press story http://www.nytimes.com/2008/12/14/us/14atlanta.html?_r=1. During proceedings on his rape charges, Nichols shot and killed his trial judge, the judge's court reporter, and a deputy sheriff court security personnel. *Id.* During his flight in an Atlanta neighborhood, Nichols killed a federal immigration and customs agent. *Id.* Nichols' defense to the homicide charges, like Baumruk's defense, was mental disease or defect. *Id.* Nichols' jury did not vote for death and could not agree on punishment, and therefore, he was sentenced to life. *Id.* That Nichols killed three people in an Atlanta courthouse, and later killed a fourth person, but the jury could not agree to impose death demonstrates Baumruk's facts were not so overwhelming that there is

not a reasonable probability of a different result.[3] There is a reasonable probability that without the Kane evidentiary matters and respondent's associated argument that Baumruk would not have been convicted of first degree murder and death sentenced.

A new trial, or at minimum, a new penalty phase is required.

[3] Respondent has made the same overwhelming evidence argument as to other claims and Baumruk's response is the same as to those as it is as to the Kane claim. *See, e.g.*, Resp.Br. at 33,42,51,55,92,107.

II.

HEARING REQUIRED EMT WORCHESTER – BAUMRUK'S APOLOGY

The motion court clearly erred denying without an evidentiary hearing the claim counsel was ineffective for failing to call EMT Worchester because an amended motion is required to plead only facts that warrant relief and is not required to anticipate legal theories a motion court may rely on to reject a claim. It was especially critical for the jury to have heard Baumruk expressed remorse because counsel failed to present other evidence that would have countered statements Baumruk made suggesting a lack of remorse.

Respondent asserts that Baumruk's brief raises a legal argument that was not pled in the 29.15 amended motion that Baumruk's statements would not have been properly subject to a hearsay objection because they fell within the dying declaration exception to the hearsay rule(Resp.Br.32).

To be entitled to an evidentiary hearing a movant must: (1) allege facts, not conclusions that warrant relief; (2) the facts alleged must not be refuted by the record; and (3) the matters complained of must have resulted in prejudice to the movant. *State v. Driver*,912S.W.2d52,55(Mo.banc1995).

The 29.15 court denied a hearing on the **legal theory** that Baumruk's statements would have been inadmissible hearsay. Under *Driver*, Baumruk was required only to plead **facts** that warrant relief. This Court has never required that a factual pleading anticipate a legal grounds on which a 29.15 court might rely to deny

a claim. Baumruk's pleadings alleged the facts necessary to entitle him to relief and he was not required to anticipate a legal ground for denying his claim, and therefore, a hearing was required. *See Driver*. For that reason, Baumruk is not raising a matter for the first time on appeal.

Respondent relies on *State v. Clay*,975S.W.2d121,142(Mo. banc1998) for its pleading argument. *Clay* stands for the proposition that a claim that never appeared in the amended motion pleadings cannot be raised for the first time on appeal. Here Baumruk's factual claim was pled in the detail required under *Driver*, and therefore, *Clay* has no application. *See* Original Brief at 54-55 setting forth Baumruk's pleadings details.

Respondent speculates that Baumruk's statement that he was sorry could have an assortment of alternative meanings other than one that could have caused the jury to have viewed Baumruk and his defense more favorably(Resp.Br.33). What other interpretations might be possible is not the standard for whether a hearing should be granted and respondent's speculation should be rejected. *See Driver*.

According to respondent, a hearing was not required because there were occurrences in which Baumruk showed a lack of remorse (Resp.Br.33). Those occurrences where the jury heard evidence that was inconsistent with Baumruk being remorseful, however, could have been explained as having been caused by Baumruk's brain injuries had counsel used scans of Baumruk's brain in conjunction with expert testimony. *See* Original Brief Points III, IV, and V. Moreover, that counsel failed to present scan evidence in conjunction with expert testimony made it that much more

compelling that the jury have heard EMT Worchester testify that Baumruk apologized. Further, it was that much more important the jury have heard from EMT Worrchester also because counsel failed to call expert Logan to testify about all the stressors in Baumruk's life, and in particular, Baumruk's sense of betrayal and rejection from Mary's actions. *See* Original Brief Point VI.

A hearing was required.

XV.

RESPONDENT'S REPEATING SLIDE SHOW – APPELLATE COUNSEL INEFFECTIVE

The motion court clearly erred overruling Baumruk's 29.15 claim appellate counsel was ineffective for failing to raise counsel's objections to a repeating highly emotionally charged slide show during penalty rebuttal argument because reasonable appellate counsel would have obtained a stipulation so as to place before this Court the slide show so that this Court could have reviewed the slide show for error and prejudice. Thus, appellate counsel's decision not to raise this claim was not reasonable strategy.

Respondent has argued that appellate counsel made a strategic decision not to challenge on appeal respondent's slide show because trial counsel failed to make it part of the record on appeal for this Court to review(Resp.Br.112-14).

In *Lassen v. State*,717S.W.2d538,539(Mo.App.,S.D.1986), a malfunction in the court reporter's equipment caused portions of the transcript to be missing from his first degree murder conviction. On direct appeal, the defendant's trial attorneys and the prosecutor stipulated to the contents of the missing portion of the transcript. The stipulations were then filed as exhibits in the direct appeal. *Lassen*,717S.W.2d at 539. *Cf., E.A.U., Inc. v. Webbe Corp.*,794S.W.2d679,682(Mo.App.,E.D.1990)(parties stipulated on appeal to instructions at issue); *Allen v. Director of Revenue*,59S.W.3d636,636(Mo.App.,W.D.2001)(because original exhibit report was missing parties stipulated to a copy on appeal). On Lassen's postconviction appeal,

he complained that his direct appeal claims could not be reviewed because there was not a complete transcript. *Lassen*,717S.W.2d at 539. That claim was rejected because the missing portions of the transcript were supplied by stipulation. *Id.*539.

In *State v. Johnson*,486S.W.2d491,494(Mo.1972), the defendant was convicted of first degree murder and argued on appeal it was error to have admitted a photo that was a state's exhibit. This Court noted that "[e]ssential exhibits should be incorporated into the record or sent here by stipulation." *Id.*494. This Court then criticized appellant's counsel for causing this Court on its own motion to have to make efforts to obtain the photo exhibit. *Id.*494.

To establish ineffectiveness, a movant must demonstrate counsel failed to exercise customary skill and diligence reasonably competent counsel would have exercised and prejudice. *Strickland v. Washington*,466U.S.668,687(1984). Counsels' strategy must be objectively reasonable and sound. *State v. McCarter*,883S.W.2d75,78(Mo.App.,S.D.1994).

Reasonable direct appeal counsel would have obtained a stipulation for the filing of the slide show with this Court. *Strickland*. That reasonable counsel would have so acted is highlighted by *Lassen, supra,* where missing portions of the contents of a transcript were filed by stipulation on direct appeal and the rejection of Lassen's postconviction claim challenging his incomplete transcript because of that stipulation. *See, also, E.A.U.* and *Allen, supra*. Moreover, under *Johnson,* this Court directed that it is appellate counsel's duty that essential exhibits be filed with this Court by stipulation. Counsel did not make a reasonable strategic decision to not raise this

matter, but instead failed to perform her duties to obtain a stipulation as is required. *See McCarter*, *Lassen, E.A.U., Allen, and Johnson.* Because counsel failed to perform her duties to obtain a stipulation, she did not challenge respondent's slide show and Baumruk was prejudiced because he was entitled to a new penalty phase. *See Strickland*.

Respondent asserts Baumruk was not prejudiced because under *State v. Strong*,142S.W.3d702,720-21(Mo.banc2004), the slide show was proper(Resp.Br.113-14). In *Strong*, the slide show that was presented during argument was proper because it was shown to have been linked to proving the aggravator that the murders were outrageously or wantonly vile, horrible or inhuman. *Id.*720-21. Here, counsel Kenyon and Steele both testified that the slide show did not have anything that tracked and correlated with the prosecutor's argument(29.15Tr.406-07,545). The slide show's contents (see details at App.Br.133-35) and respondent's penalty argument (see details at App.Br.135-38) confirm that the slide show was not linked to proving any matter the state was required to prove, but instead was intended to appeal to caprice and emotion and rendered the punishment decision fundamentally unfair. *See Gardner v. Florida*,430U.S.349,358(1977) and *Payne v. Tennessee*,501U.S.808,831(1991).

A new penalty phase is required.

XVII.

RABUN'S DIVORCE

The motion court clearly erred overruling Baumruk's 29.15 because counsel was ineffective for failing to cross-examine and impeach Rabun that he rendered his first opinions about Baumruk's mental state while Rabun's divorce was pending in front of Judge Hais, an alleged target of Baumruk's courtroom shooting, because the amended motion alleged counsel was ineffective for failing to "introduce evidence" to show Rabun's bias because the noted facts established Rabun had "a conflict of interest" and the claim presented in the Point Relied On and briefed is the same as contained in the 29.15 pleadings. Moreover, the reason counsel failed to "introduce evidence" was because counsel failed to investigate.

Respondent has argued that the amended motion refers to counsel's failure to discover the evidence impeaching Rabun, but the Point Relied On fails to reference counsel being ineffective for failing to investigate(Resp.Br.120). From that respondent asserts that claims not included in the Point Relied On are waived(Resp.Br. 120).

The amended motion alleged counsel was ineffective for failing to "introduce evidence" to show Rabun's bias(29.15L.F.244). The amended motion continued pleading that counsel is ineffective for failing "to impeach critical witnesses"(29.15L.F.245). The pleadings continue that the impeaching evidence here was the fact Rabun's divorce was pending in front of Judge Hais at the same time

Rabun was rendering opinions about Baumruk's mental state and Judge Hais was an alleged target of Baumruk's acts(29.15L.F.245-49).

Baumruk's Point Relied On alleged counsel was ineffective for failing to cross-examine and impeach Rabun with the pendency of his divorce in front of Judge Hais at the same time that Judge Hais was one of Baumruk's alleged targets. *See* App.Br.40,147. The Point Relied On and its corresponding argument are the same as what was alleged in the amended motion, and therefore, no waiver of Baumruk's claim has occurred. The reason counsel failed to "introduce evidence" to show Rabun's bias and to impeach Rabun (29.15L.F.244) was because they failed to conduct investigation.

Respondent also asserts that this claim should be rejected because the information impeaching Rabun "would not have provided a viable defense because it would not have negated an element of the crime"(Resp.Br.121). Counsel is ineffective when they fail to impeach critical witnesses. *Black v. State*,151S.W.3d49,51(Mo.banc2004); *Hadley v. Groose*,97F.3d1131,1136(8thCir.1996). "[T]he pecuniary interest, bias or prejudice of a witness may always be shown." *State v. Anderson*,79S.W.3d420,437(Mo.banc2002). "Because the jury is to assess credibility, it is entitled to any information which might bear significantly on the veracity of a witness….[A]nything that has the legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness is proper for determining the credibility of a witness." *Wainwright v.*

State,143S.W.3d681,689(Mo.App.,W.D.2004)(internal quotation marks and citations omitted). The pendency of Rabun's divorce in front of Judge Hais at the same time Rabun was expressing opinions unfavorable to Baumruk would have impeached Rabun and discredited Rabun's opinions. Impeaching Rabun in this manner was critical because respondent urged that Rabun's opinions were overwhelmingly credible and the jury should believe them(2ndTrialTr.2676). It was not necessary that the impeaching evidence standing alone provided Baumruk a defense. *See Black*, *Hadley*, *Anderson*, and *Wainwright*.

A new trial is required.

CONCLUSION

For the reasons discussed in the original appellant's brief and this reply brief this Court should order the following: (a) Points IX, XII, XVII, XVIII - a new trial; (b) Points I, X - a new trial or at minimum a new penalty phase; (c) Points V, XI, XIV, XV, XIX - a new penalty phase; (d) Points II, III,VI, VII, VIII, XIII - a 29.15 evidentiary hearing; (e) Point IV - remand to allow medical scans; and (f) Point XVI - remand for findings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, William J. Swift, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2010, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 6,393 which does not exceed twenty-five percent of the 31,000 words (7,750) allowed for an appellant's reply brief.

The brief has been scanned for viruses using a Symantec Endpoint Protection program, which was updated in January, 2012. According to that program the brief is virus-free.

A true and correct copy of the attached brief has been served electronically using the Missouri Supreme Court's electronic filing system this 24th day of January, 2012, on Assistant Attorney General Daniel N. McPherson of the Office of the Missouri Attorney General, P.O. Box 899 Jefferson City, Missouri 65102.

/s/ William J. Swift
William J. Swif